LIBRARY
SUPREME COURT U. S.

Office - Supreme Court, U.S.
FILED
MAY 5 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957

No. 871

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE B. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-Partners doing business under the name of SURPLEX SALES,

Petitioners,

vs.

UNION CARBIDE & CARBON CORPORATION, a New York Corporation, Owners and Operators of Division Thereof Known as HAYNES STELLITE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Reply Brief for Petitioners

AVRUM N. ANDALMAN
33 N. La Salle Street, Room 1822
Chicago 2, Illinois,
and
HARRY G. FINS,
77 W. Washington Street,
Suite 1521
Chicago 2, Illinois,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957

No. 871

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE B. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-Partners doing business under the name of SURPLEX SALES,

Petitioners,

vs.

UNION CARBIDE & CARBON CORPORATION, a New York Corporation, Owners and Operators of Division Thereof Known as HAYNES-STELLITE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Reply Brief for Petitioners

May It Please The Court:

It is regrettable that the Brief In Opposition filed by the Respondent contains misstatements of facts and issues herein involved. Because of this, it is necessary for the Petitioners to file this Reply Brief.

I.

The Petitioners, in particular, and the public in general, cannot be bound by a Federal agency regulation which was not published in the Federal register. Such publication is required by Title 44 of the United States Code Sections 301-310.

In 1954 the Ninth Circuit so held and said that such an unpublished regulation is not binding *and is ineffective. Hotch* v. *United States*, 212 Fed. (2nd) 380.

In 1957 the Seventh Circuit, in the case at bar, has held to the contrary (*Finsky et al.* v. *Union Carbide & Carbon Corporation*, 249 Fed. (2) 449). This directly conflicts with the decision of the Ninth Circuit in the *Hotch* case *supra*.

At page 12 of its Brief, Respondent states that "the unpublished regulation involved relates only to the internal management of the Government Agencies and, in any event, *was not adopted for the guidance of the public*, * * *". (Emphasis ours.)

If this is so, it necessarily follows that this unpublished regulation could not be binding upon the public, nor upon the Petitioners as members of the public, as the unpublished regulation was intended only for interdepartmental guidance.

Accordingly, it cannot nor was it intended to, in any way, affect the rights of outsiders dealing, as members of the public, with Government Agencies. The case of *Foreman & Clark* v. *N.L.R.B.*, 215 Fed. (2nd) 396 at 410, cited by Respondent, has no bearing on this case, nor does it in any way negate the applicability of Section 2a of the Federal Administrative Procedure Act to which we referred at page 11 of our Petition and quoted: "Every agency shall separately state and currently publish in the Federal Register * * * substantive rules adopted as authorized by law * * * ".

We further call the Court's attention to the very end of said Section 2a which states: *"No person shall in any manner be required to resort to organization or procedure not so published"* (Pet. App. 27a). The problem involved in the *Foreman Clark* case was one of authorization by the department to itself to perform an act. THE PROBLEM INVOLVED IN THE INSTANT CASE IS ONE OF NOTICE TO THE PUBLIC AND TO THE PETITIONERS.

Therefore, since this unpublished regulation cannot be applied to petitioners, the material here involved, insofar as petitioners are concerned, was not and is not subject to stockpiling.

V.

Any instrument, issued by an executive agency of the United States which purports "to transfer title or any other interest" in Government "surplus property" to a "bona fide" "transferee for value, and without notice of lack of compliance", constitutes "conclusive evidence of compliance with the provisions of" Section 484(d) of Title 40 United States Code.

In 1949, the Ninth Circuit held that such transferee's rights were invulnerable to attack. (*United States* v. *Jones*, 176 Fed. (2nd) 278.)

In 1957, the Seventh Circuit, in the case at bar, held that such transferee's rights are vulnerable to attack (*Finsky et al.* v. *Union Carbide & Carbon Corp.*, 249 Fed. (2nd) 449). This is in direct conflict with the Ninth Circuit decision in the *Jones* case.

Respondent's Brief (p. 8) asserts that subsection (d) of Sec. 484 Title 40 United States Code is inapplicable to the facts in this case. It cites three reasons which we here set forth and answer categorically, as follows:

(1) "There is no instrument purporting to transfer title". (Brief in Opposition p. 8).

We answer: There are a number of instruments in the record purporting to transfer title.

We call attention to two of these:

(a) Petitioner's Ex. 21 (Rec. 206, 207). This letter from an Executive Agency (Dept. of the Army) advises Respondent's division that Petitioner's bid has been accepted and the amount of bid, $226,570.70 will be deducted from final settlement between the Government and Respondent.

Items referred to in said exhibit are identified by Ex. 20, 20-A and 20-B (Rec. 204, 206) and include the tungsten powder in question.

(b) Petitioner's Ex. 22 (Rec. 207). This letter of award from Respondent's division to Petitioners covers the material in question.

The Executive Agency having notified Respondent that the bid was accepted, its act in issuing the letter of award must be held to be the act of the Executive Agency.

This transferred title to Petitioner, subject to payment. The payment was prevented by the act of the agency (Rec. 209) *which caused Respondent to violate its agreement with Petitioners.*

Therefore the record shows "other instruments executed by or on behalf of" an executive agency which not only purports to, but does, transfer title in the property in question.

(2) "Petitioners had not paid value". (Opposition Brief, p. 8).

We answer: Petitioners were prevented by the unlawful act of the Government (Rec. 209) from making full payments. Petitioners never asked for credit. After delivery of the letter of award March 5, 1954 (Rec. 207) part of the merchandise was turned over to Petitioners and paid for

(Rec. 170) and the time—*not the terms*—of payment was arranged for (Rec. 162, 179). After the Government interfered, Respondent would not have delivered the merchandise "until matters were straightened out with the Government" (Rec. 180).

Under the circumstances Respondent cannot complain that all of the merchandise was not paid for.

(3) "The tungsten powder has never been declared surplus property within the meaning of 40 U. S. C. 472 (d)." (Opp. Brf. p. 8).

We answer: The Department of the Army's notification of "cancellation of contract for the convenience of the Government" served by it upon the Respondent March 11, 1953, stopped Respondent's work (Ex. 2, Rec. 194-195). The Department's letter to Respondent (Ex. 8, Rec. 195) referred to the merchandise here in question and said, "It has been determined that the above item be disposed of as salvage by sale * * * ". It directed Respondent to obtain bids (Rec. 196).

There is no difference between "surplus" and the term "salvage".

This letter establishes also that the Executive Agency (Department of the Army) definitely intended the merchandise in question to be considered contract termination inventory which it did not take possession of and, on the contrary, ordered the contractor to sell.

It follows that the property involved is surplus or contract termination inventory not taken possession of by the Executive Agency.

Attention is called to the fact that Respondent's advertisements are a representation to the world that they had the proper authority to sell the materials involved (Rec. 17). Its letter to Petitioners on February 11, 1954 (Rec. 15, 16) soliciting Petitioner's bid makes no reference whatsoever to the United States Government.

Respondent's official in charge, Glen H. Shelton, testified on deposition as follows, (Rec. 175):

> "When I gave Maxwell Andalman [one of Petitioners] Plff's. Ex. No. 22 on March 6, 1954 [Rec. 207, written award] I did not know of any Government regulation that has been violated. No one connected with New York Ordnance District told me at that time that Government regulation had been violated. Nor did I make inquiry. I was under the impression that all pertinent regulations had been followed so that at the time I gave him Ex. No. 22, I believed that our company had followed all required regulations. I believed that we had been acting at all times under valid instructions under the Contracting Officer. I did not know that any regulation might have been violated by anyone. I had no inkling. In advertising the tungsten powder I was under the impression that we were proceeding right." (Matter in brackets ours.)

United States v. *Jones*, 176 Fed. (2nd) 278, fully supports the position that it was Congress' intention in creating the Surplus Property Act to provide for final disposition thereof to the public rather than impose upon bidders the impossible task of investigating each agency to insure that Governmental requirements had been complied with by its officials. As there stated "If * * * in the absence of fraud or venality * * * the government could question the transaction, *the aims of the Statute would* be thwarted." (Emphasis ours.)

III.

Strategic or critical material in government termination inventory (of which the United States has not taken possession) is exempt from stockpiling under Title 50 United States Code Section 98e(a).

The record shows that the United States Government did not take possession of the property here involved prior to

March 6, 1954, the date when Petitioners received their written award (Rec. 12, 35, 167 ff).

The Respondent's official, Royal Williams, testified by deposition as follows (Rec. 156):

> "To the best of my recollection no Government Agency or officer, prior to February 23, 1954, requested possession of any of the involved tungsten. New York Ordnance did not request possession between February 23, 1954 and March 9, 1954. No other agency, officer or department of the United States between those dates ever requested possession."

Mr. Williams' superior, who is Respondent's official, Glen H. Shelton, testified by deposition as follows (Rec. 175-176):

> "I was present during the questioning of Mr. Williams and Mr. Dalton [illegible] heard questions put to them. In general, my answers would be similar".

The above testimony of the two Respondent's officials stands uncontroverted. It is, therefore, clear that the Government did not take possession of the property here involved.

If there is here involved a disputed question of fact on this point, then the District Court had no authority to enter a SUMMARY JUDGMENT, *on Respondent's Motion, as was done in the case at bar.*

It is the law that Strategic or Critical Material in Government Contractor Termination Inventory which has not been taken possession of by the Government is exempt from stockpiling under Title 50 United States Code, Section 98e Subsection(a).

The statement which appears at page 15 of Respondent's Brief that the General Services Administration "is not precluded from stockpiling such [exempted] materials where the interests of National Defense are paramount" finds no basis in the Statute or in fact.

The Executive Agency (Dept. of Army) under its contract elected to serve upon Respondent March 11, 1953 Ex. 2 (Rec. 194) which is "a notice of contract termination". Not a single word is contained therein by which the Department of the Army required possession or title.

Again, this same agency wrote to Respondent February 1, 1954 (See Ex. A, Rec. 195-197) referring to the 173,205 pounds of tungsten in question here ordering Respondent to solicit bids for the property.

Again, the Department wrote Respondent February 13, 1954 (Ex. 9, Rec. 197-198) advising sale should be on a cash basis "any credit extended to the successful bidder will be at your own risk".

On February 24, 1954 the Department received from the Respondent (Ex. 20) a letter submitting for the Department's consideration all bids received by the Respondent (See Ex. 20A, Rec. 205; Ex. 20B, Rec. 206) showing Petitioner's high bids.

On March 5, 1954, the Department wrote to Respondent (Ex. 21, Rec. 206-207) accepting Petitioner's bid and charging Respondent's account with $226,570.70.

The conclusion, from these documents, is inescapable that there was no intention on the part of the Department of the Army (until after the sale to the Petitioners was made) to retain or possess this contractor inventory.

The Act of Congress, which as a matter of substantive law, creates an exemption, must be applied with full force and effect and that language contained in Sec. 98e Subsec. (a) of Titles 50 United States Code is "*There shall also be exempt from the requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory* • • • ". (Emphasis ours.)

The owning agency did not take possession; the merchandise was sold to the Petitioners and they were entitled thereto.

The material in question, under the Statute, was and is exempt.

CONCLUSION.

We respectfully submit that the Petitioners have not brought this action against the United States Government. This is an action against a private corporation for breach of contract, wherein the Petitioners seek to recover money damages from a private corporation.

The cause here involved presents important questions of Federal Law on which there is conflict between various Circuits of the United States Courts of Appeal.

For the reasons set forth in the Petition for Certiorari and in this Reply Brief, we urge that the Writ of Certiorari be granted.

Respectfully submitted,

AVRUM N. ANDALMAN and
HARRY G. FINS,
Attorneys for Petitioners.